

IN THE SUPREME COURT OF IOWA

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STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	S.CT. NO. 18-1298
	)	
LEVI GIBBS, III	)	
	)	
Defendant-Appellant.	)	

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APPEAL FROM THE IOWA DISTRICT COURT  
FOR WEBSTER COUNTY  
HONORABLE THOMAS J. BICE, JUDGE

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APPELLANT'S BRIEF AND ARGUMENT AND  
REQUEST FOR ORAL ARGUMENT

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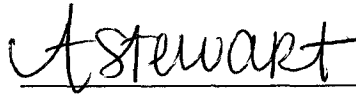
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## **CERTIFICATE OF SERVICE**

On the 26<sup>th</sup> day of April, 2019, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Levi Gibbs, III, No. 6736533, Iowa State Penitentiary, 2111 330th Avenue, PO Box 316, Fort Madison, IA 52627.

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## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

### **I. WHETHER IOWA CODE § 704.2B(1) COMPELS SELF-INCRIMINATION IN VIOLATION OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND INFRINGES ON DUE PROCESS RIGHTS UNDER ARTICLE I, § 9 OF THE IOWA CONSTITUTION?**

#### **Authorities**

State v. Allen, 304 N.W.2d 203, 206 (Iowa 1981)

Iowa Code § 704.2B(1) (2017)

State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983)

State v. Seering, 701 N.W.2d 655, 661 (Iowa 2005)

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State v. Akins, 423 P.3d. 1026 (Idaho 2018)

Iowa Code § 704.2B(1) (2017)

**1. Iowa Code § 704.2B is a criminal statute.**

Albertson v. Subversive Activities Control Board, 382 U.S. 70, 86 S.Ct. 194 (1965)

United States v. Sullivan, 274 U.S. 259, 47 S. Ct. 607 (1927)

California v. Byers, 402 U.S. 424, 429, 91 S. Ct. 1535, 1539 (1971)

Marchetti v. United States, 390 U.S. 39, 99 S.Ct. 697 (1968)

Grosso v. United States, 390 U.S. 62, 88 S.Ct. 70 (1968)

Haynes v. United States, 390 U.S. 85, 88 S.Ct. 722 (1968)

Iowa Code § 704.3 (2017)

Iowa Code § 704.4 (2017)

Iowa Code § 704.6 (2017)

Iowa Code 4.6(3)

Abbas v. Iowa Insurance Division, 893 N.W.2d 879, 889-91 (Iowa 2017)

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87 IA State Leg. (April 6, 2017)

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State v. Harrison, 914 N.W.2d 178, 188 (Iowa 2018)

**2. Iowa Code § 704.2B(1) is directed at a highly selective group inherently suspected of criminal activities.**

Iowa Code § 704.2B(1) (2017)

Albertson v. Subversive Activities Control Board, 382 U.S. 70, 86 S.Ct. 194 (1965)

Haynes v. United States, 390 U.S. 85, 88 S.Ct. 722 (1968)

**3. Compliance with Iowa Code § 704.2B(1) creates a real risk of self-incrimination by requiring an individual to provide a “link in the chain” for prosecution of homicide or other crimes.**

Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814, 818 (1951)

California v. Byers, 402 U.S. at 428-429, 91 S.Ct. 1535, 1538-1539 (1971)

Hilbel v. Sixth Judicial District, 542 U.S. 177, 189, 124 S.Ct. 2451, 2460 (2004)

State v. Iowa District Court for Webster County, 801 N.W.2d 513, 562 (Iowa 2011)

State v. Godbersen, 493 N.W.2d 852, 857 (Iowa 1992)

U.S. Const. amend VI

Iowa Const. art. I, 10

Strickland v. Washington, 466 U.S. 668, 694 (1984)

Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981)

Schertz v. State, 380 N.W.2d 675, 679 (Iowa 1985)

State v. Schaer, 757 N.W.2d 630, 638 (Iowa 2008)

**II. WHETHER THE DISTRICT COURT ERRED IN  
ALLOWING IOWA CODE § 704.2B AS A JURY INSTRUCTION  
AND FURTHER ERRED BY NOT INCLUDING GIBBS'  
REQUESTED MODIFIED INSTRUCTION?**

**Authorities**

Iowa Code § 704.2B (2017)

State v. Allen, 304 N.W.2d 203, 206 (Iowa 1981)

State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983)

State v. Anderson, 636 N.W. 2d 26, 30 (Iowa 2001)

Summy v. City of Des Moines, 708 N.W.2d 333, 340 (Iowa 2006)

State v. Lyman, 776 N.W. 2d 865, 873 (Iowa 2010)

State v. Marin, 788 N.W.2d 833, 831 (Iowa 2010)

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State v. Cordero, 861 N.W.2d 253, 257-58 (Iowa 2015)

State v. Becker, 818 N.W.2d 135, 141 (Iowa 2012)

State v. Hoyman, 863 N.W.2d 1, 7 (Iowa 2015)

## **ROUTING STATEMENT**

This case should be retained by the Iowa Supreme Court because the issue raised involves a substantial issue of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c).

## **STATEMENT OF THE CASE**

### **Nature of Case**

Defendant-Appellant Levi Gibbs, III, appeals his conviction, sentence, and judgment following a jury trial and verdict finding him guilty of murder in the second degree, a class B felony, in violation of Iowa Code § 707.1 and Iowa Code § 707.3 (2017).

### **Course of Proceeding:**

The State charged Levi Gibbs, III, with first degree murder, a class A felony in violation of Iowa Codes sections 707.1 and 707.2 (2017). Gibbs was also charged with possession of a firearm or offensive weapon by a felon, a class D felony, in violation of Iowa Code § 724.26 (1) and going armed with intent, a class D felony, in violation of Iowa Code § 708.8. The State

alleged that Gibbs killed Shane Wessels with premeditation. (Trial Information) (App. pp. 5-7). Gibbs pled not guilty to all charges. (Written Arraignment and Plea of Not Guilty) (App. pp. 8-9).

On November 28, 2017, Gibbs filed notice of his intent to rely on a justification defense based on defense of a third person. (11/20/2018 Notice) (App. p. 10). Gibbs and the State stipulated that the court would not instruct the jury that Gibbs had no duty to retreat as provided by Iowa Code § 704.1(3) and that Count II (possession of a firearm or offensive weapon by a felon) would be severed from the trial. (01/30/2018 Stipulation filing) (App. pp. 11-12). The Court granted the stipulation. (01/30/2018 Order ) (App. pp. 13-14).

Trial commenced on June 25, 2018. (Tr. p. 1, L10). At the conclusion of trial, the jury convicted Gibbs of murder in the second degree. (Criminal Verdict) (App. pp. 26-27).

On July 27, 2018, the Court sentenced Gibbs to the custody of the Iowa Department of Corrections for an indeterminate fifty years. (Order of Disp.) (App. pp. 28-32).

Gibbs filed a timely notice of appeal on August 2, 2018. (Notice of Appeal) (App. pp. 33-36).

**Facts:**

On September 3, 2017, Gibbs shot and killed Shane Wessels (hereafter “Wessels”), in the Pleasant Valley neighborhood also known as the “flats” in Fort Dodge, Iowa. Gibbs argued that he acted in defense of his sister, Latricia Roby (hereafter “Roby”), who was injured by Wessels during a fight. (Ex. 12; Tr. p. 60, L15- p. p. 61, L20). The State contended that Gibbs shot Wessels intentionally, willfully and with malice. (Trial Information) (App. pp. 5-7).

According to trial testimony, in the early morning hours of September 3, 2017, several people, including Wessels, Roby, and Gibbs, were present at the scene of the shooting. (Ex 80; Tr. p. 351, L19-25; p. 500, L16-25; p. 854, L14-18; p. 892, L15-20). At some point a fight started between Wessels, Roby and several other women present at the scene. (Tr. p. 290, L10-17; p. 351, L2-6; p. 391, L3-9; p. 500, L16-25; p. 853, L19-24; p. 856, L5-7; p. 892, L13-14; p. 892, L15-20; p. 893,

L12-15).

Eyewitnesses testified that Wessels was hit with bottles, was tased by one woman, and was hit with a club by Roby, during the fight. (Tr. p. 351, L2-6; p 353, L3-4; p. 354, L20- p. 355, L1; p. 439, L10-p. 440, L2; p. 444, L4-8; p. 501, L22- p. 502, L4; p. 504, L10-14). Also during the fight, several eyewitnesses saw Wessels hit Roby and saw him fighting with other women. (Tr. p. 352, L21- p. 353, L7; p. 440, L11; p. 856, L8-12; p. 857, L8; p. 858, L3-6; p. 907, L22- p. 908, L2).

Witness Haven Junkman testified that she saw blood leaking from Roby's nose, down her body. (Tr. p. 858, L8-10).

At some point during the fight, witnesses heard gun shots and noticed that Shane was wounded. (Tr. p. 394, L1-15; p. 507, L15-19). Witnesses identified Gibbs as the shooter. (Tr. p. p. 357, L17-19; p. 396, L19-25). After the fight, Roby was treated at the emergency room and suffered from an external tear of her ear from her scalp and a broken nose. (Tr. p. 790, L3-9; 938, L1-4; p. 942, L12).

On September 4, 2017, Gibbs spoke with Larry Hedlund

(hereafter “Hedlund”), a detective with the Fort Dodge Police Department. (Tr. p. 792, L1-25; p. 793, L6-18; p. 794, L19-25). Gibbs did not tell Hedlund that he shot Wessels in self-defense. (Tr. p. 806, L12-15). Gibbs was arrested on September 18, 2017, and was interviewed by Hedlund. (Tr. p. 819, L19-22, p. 821, L10-14). During the interview on September 18, 2017, Gibbs did not tell Hedlund that he shot Wessels in self-defense. (Ex. 13).

Further facts will be discussed as necessary.

### **Argument:**

#### **I. IOWA CODE § 704.2B(1) COMPELS SELF-INCRIMINATION IN VIOLATION OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND INFRINGES ON DUE PROCESS RIGHTS UNDER ARTICLE I, § 9 OF THE IOWA CONSTITUTION.**

**A. Preservation of Error:** In order to preserve for review any alleged error in ruling on the constitutionality of a statute, a party challenging the statute must do so at the earliest available opportunity in the progress of a case. State v. Allen, 304 N.W.2d 203, 206 (Iowa 1981).

Here, when Gibbs’ attorney realized the State would use

Gibbs' failure to comply with Iowa Code § 704.2B(1) to show that Gibbs acted without justification, he objected. (Tr. p. 1012, L21-25; Jury Instruction No. 36) (App. p. 24). Trial counsel argued:

"This instruction, in this set of instructions, in this town, in this shooting, allows the jury to say that Levi Gibbs violated the law, and they could conclude therefore, he's guilty and I know the state is going to argue that. That is a direct violation of his due process and his fifth amendment rights."

(Tr. p. 1012, L21-p. 1013, L2). Gibbs requested that the instruction should be excluded. In the alternative Gibbs requested an addendum to the instruction stating: "if you determine that the defendant did not comply with of this instruction [jury instruction no. 36], he is still legally able to assert the defense of another person as explained in instruction no..." The State resisted the objection. The district court ruled:

"Well the Court believes that proposed jury instruction No. 36 does accurately reflect the statutory language as found in 704.2B... If there's to be some correction of a legislative defense created by statute, then we will let the appellate court be the one to give us the appropriate direction in that regard."

(Tr. p. 1011, L2-11; p. 1013, L15; Tr. p. 1015, L15-p. 1016, p. 25; Tr. p. 1017, L1-9). Therefore, error was preserved. State v. Allen, 304 N.W.2d 203, 206 (Iowa 1981).

To the extent this Court concludes that error was not properly preserved for any reason, Gibbs requests that the issue be considered under the Court's familiar ineffective assistance of counsel framework. State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

**B. Standard of Review:** The Supreme Court reviews constitutional challenges to a statute de novo. State v. Seering, 701 N.W.2d 655, 661 (Iowa 2005). Statutes are cloaked with the presumption of constitutionality. The challenger bears a heavy burden because it must prove the unconstitutionality beyond a reasonable doubt. Moreover, "the challenger must refute every reasonable basis upon which the statute could be found to be constitutional." If the statute is capable of being construed in more than one manner, one of which is constitutional, we must adopt the construction. State v. Hernandez-Lopez, 639 N.W. 2d 226, 233 (Iowa 2002)

(citations omitted). However, where parts of a statute or ordinance are constitutionally valid, but other discrete and identifiable parts infirm, the Supreme Court may sever the offending portion from the enactment and leave the remainder intact. American Dog Owner's Association, Inc. v. City of Des Moines, 469 N.W.2d 416, 418 (Iowa 1991).

Severance is appropriate if it does not substantially impair the legislative purpose, if the enactment remains capable of fulfilling the apparent legislative intent and if the remaining portion of the enactment can be given effect without the invalid portion. Id.

Here, Gibbs contends that 704.2B subsection 1 violates the Fifth Amendment of the U.S. Constitution and article I, § 9 of the Iowa Constitution.

**C. Discussion:** “The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, commands that ‘[n]o person... shall be compelled in any criminal case to be a witness against himself.’ U.S. Const. amend. V; amend. XIV.

Due the violation of his Fifth Amendment rights, Gibbs was denied his right to a fair trial under article I, § 9 of the Iowa Constitution. The Iowa Constitution's due process clause provides "that no person shall be deprived of life, liberty, or property without due process of the law." Iowa const. art. I, § 9; See State v. Becker, 818 N.W.2d 135 (Iowa 2012). The Iowa Supreme Court "has generally considered the federal and state due process clauses to be "identical in scope, import, and purpose." Nguyen v. State, 878 N.W.2d 744, 755 (Iowa 2016). However, Iowa courts are free to interpret the state constitution more stringently than its federal counterpart' "providing greater protection for our citizen's constitutional rights..." Id.

The privilege against self-incrimination is "always broadly construed ... to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action." Maness v. Meyers, 419 U.S. 449, 461, 95 S. Ct. 584, 593 (1975). "Thus, the Fifth Amendment not only excludes from use in criminal proceedings any evidence obtained from the defendant in violation of the

privilege, but also is operative before criminal proceedings are instituted: it bars the government from using compulsion to obtain incriminating information from any person.” Baxter v. Palmigiano, 425 U.S. 308, 327, 96, S. Ct. 1551, 1562 (1976).

The Fifth Amendment provides “a complete defense” to the prosecution of an offense if the individual's compliance with the statute compels self-incrimination. Marchetti v. United States, 390 U.S. 39, 60-61 (1968). The U.S. Supreme Court broadly interprets the type of information and the scope of individuals protected by the Fifth Amendment. Hoffman v. United States, 341 U.S. 479, 486, 71 S. Ct. 814 (1951).

The Iowa Supreme Court also broadly interprets the type of information and the scope of protection afforded by the Fifth Amendment. State v. Godbersen, 493 N.W.2d 852 (Iowa 1992) (drug tax stamp); State v. District Court For Webster County, 801 N.W.2d 513 (Iowa 2011) (in-prison sex offender treatment program).

“[T]he protected information does not merely encompass evidence which may lead to criminal conviction, but includes

information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution.” Meyers, 419 U.S. at 461, 95 S. Ct. at 593 (citing Hoffman, 341 U.S. at 486, 71 S. Ct. at 818).

“And it is not necessary that a person be guilty of criminal misconduct to invoke the privilege; an innocent person, perhaps fearing that revelation of information would tend to connect him with a crime he did not commit, also has its protection.”

Palmigiano 425 U.S. at 326-27, 96 S. Ct. at 1562.

“The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances.” Grunewald v. United States, 353 U.S. 391, 421, 77 S. Ct. 963, 983 (1957) (quoting Slochower v. Board of Higher Education of New York, 350 U.S. 551, 557-58, 76 S. Ct. 637, 641 (1956)).

“[T]o invoke the privilege it is necessary to show that the compelled disclosures will themselves confront the claimant with substantial hazards of self-incrimination.” California v. Byers, 402 U.S. 424, 429, 91 S. Ct. 1535, 1539 (1971) (plurality

opinion).

“[J]udicial scrutiny is invariably a close one” when the courts are “confronted with the question of compelled disclosure that has an incriminating potential.” Id. at 427.

Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly.

Byers, 402 U.S. at 429, 91 S. Ct. at 1539. (plurality opinion).

The United States Supreme Court has examined cases that have included reporting statutes challenged for compelling self-incrimination disclosures.

In United States v. Sullivan, 274 U.S. 259, 47 S. Ct. 607 (1927), a bootlegger was prosecuted for failure to file an income tax return. The United States Supreme Court rejected the defendant's claim that the “privilege against compulsory self-incrimination afforded him a complete defense because filing a [tax] return would have tended to incriminate him by revealing the unlawful source of his income.” Id. The court

recognized that an extension of the privilege to cover mandatory reporting would have been unjustified and in order to invoke the privilege it is necessary to show that the compelled disclosures will themselves confront the claimant with “substantial hazard of self-incrimination.” Sullivan, at 274 U.S. 263-64, S.Ct at 608.

In Albertson v. Subversive Activities Control Board, 382 U.S. 70, 86 S.Ct. 194 (1965), there was a statute requiring individuals to register as members of the Communist party, which could be used to prosecute them under at least two federal statutes. The United States Supreme Court distinguished from Sullivan and held that the statute in question targeted a suspected criminal group. Albertson, 382 U.S. at 78-79, 86 S.Ct. at 198. Unlike Sullivan, where “the questions on the income tax return were neutral on their face and directed at the public at large, here they are directed at a highly selective group inherently suspected of criminal activities.” The response to any of the Communist Party registration questions “in context might involve the

[defendant's] admission to a crucial element of a crime.”

Albertson, 382 U.S. at 79, 86 S.Ct. at 198.

In the late 1960's, the United States Supreme Court considered the conflict between the privilege against self-incrimination and the government's need to tax illegal conduct. See Marchetti v. United States, 390 U.S. 39, 99 S.Ct. 697 (1968) (wagering tax system); Grosso v. United States, 390 U.S. 62, 88 S.Ct. 70 (1968) (wagering tax system); Haynes v. United States, 390 U.S. 85, 88 S.Ct. 722 (1968) (failure to register a firearm); Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532 (1969) (federal marijuana tax).

The U.S. Supreme Court established a four-factor test to determine whether a reporting or disclosure statute confronts an individual with a substantial hazard of self-incrimination: (1) whether the statute is regulatory or criminal; (2) whether the statute is directed at the public at large or a “highly selective group inherently suspected of criminal activities”; (3) whether the statute creates a “real and appreciable risk of self-incrimination; and (4) whether the statute compels the

disclosure of information which would constitute a “significant link in a chain of evidence tending to establish guilt.”

Marchetti, 390 U.S. at 47-48, 99 S.Ct. at 702-703. Later, this analysis was followed by the Iowa Supreme Court in two cases State v. Godbersen, 493 N.W.2d 852 (1992) (drug tax stamp) and State v. District Court for Webster County, 801 N.W.2d 513 (Iowa 2011) (sex offender prison treatment program).

Following the cases of the 1960’s, the U.S. Supreme Court decided California v. Byers, 402 U.S. 424, 91 S.Ct. 1535 (1971), where a statute mandated that a driver of any vehicle involved in an automobile accident resulting in property damage to stop at the scene and provide his name and address to the owner of such property. Id. In a plurality opinion, the Court distinguished California’s ‘hit and run’ statute from Marchetti using the first two factors of the test: (1) whether the statute is regulatory or criminal; (2) whether the statute is directed at the public at large or a “highly selective group inherently suspected of criminal activities”. The Byers Court held that the ‘hit and run’ statute, found in California’s vehicle code, was “essentially

regulatory, not criminal.” The Court also noted that the statute was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities arising from automobile accidents. Id. at 430-431, 91 S.Ct. at 1535.

Using a combination of the Marchetti analysis and the two-part test analysis in Byers, the Idaho Supreme Court addressed whether a reporting statute violated the Fifth Amendment of the United States Constitution. State v. Akins, 423 P.3d.1026 (Idaho 2018).

In Akins, the Idaho legislature enacted a reporting statute imposing a duty on a person to notify the county coroner or law enforcement of a death that would be subject to a coroner’s investigation including a death by violence, under suspicious circumstances, or of a stillborn baby. Akins 423 P.3d at 1029. The Idaho Supreme Court concluded that the statute violated the Fifth Amendment because it was: (1) a statute found amongst the criminal procedure statutes regarding coroner inquests; and (2) compliance with the statute would create a substantial hazard of self-incrimination. Akins 423 P.3d at

1035.

In the present case, Iowa Code § 704.2B(1) is similar to the statute enacted in Idaho and discussed in Akins.

Iowa Code § 704.2B(1) reads:

A person using deadly force is required to notify or cause another to notify a law enforcement agency about his use of deadly force within a reasonable time period after the use of deadly force, if the Defendant or another person is capable of providing such notification.

Iowa Code § 704.2B(1) (2017) (Jury Instruction No. 36).

Like in Akins, Iowa Code § 704.2B is a criminal statute that compels a substantial hazard of self-incrimination by requesting compliance with the reporting statute. Any constitutional protections outweigh the government's demand for the information and 704.2B(1) fails both the Marchetti and Byers test.

**1. Iowa Code § 704.2B is a criminal statute.**

This factor considers whether the defendant's claim of privilege is asserted "in an essentially noncriminal or regulatory area of inquiry" or in an area "permeated with criminal

statutes.” Albertson, 382 U.S. at 79, 86 S.Ct at 199.

In Sullivan and Byers, the U.S. Supreme Court held the statutes to be regulatory and noncriminal. Sullivan, 274 U.S. at 263-64, 47, S.Ct at 608; Byers, 402 U.S. at 429-430, 91 S.Ct. at 1539 (plurality opinion). However, the Court considered the gambling tax in Marchetti and Grosso; the Communist Party registration in Albertson; and the firearms registration in Haynes to be part of a criminal statutory scheme. Marchetti, 390 U.S. at 39, 99 S.Ct. at 697; Grosso, 390 U.S. at 62, 88 S.Ct. at 70; Albertson, 382 U.S. at 79, 86 S.Ct. at 194, 199; Haynes, 390 U.S. at 97, 88 S.Ct. at 730.

First, Iowa Code § 704.2B is a criminal statute because it compels individuals to report a violent action that generally has criminal implications (i.e. assault, attempted murder, murder).

Secondly, Iowa Code § 704.2B is included in chapter 704 of the Iowa Code, which contains solely criminal provisions related to the use of reasonable deadly force and criminal justification defenses including defense of others, defense of property, and when those defenses are not available. Iowa

Code § 704.3, § 704.4, § 704.6 (2017).

Thirdly, the criminal intent of the law can be determined through the analyzing the intent of the legislature. See Iowa Code 4.6(3); Abbas v. Iowa Insurance Division, 893 N.W.2d 879, 889-91 (Iowa 2017). Iowa Code § 704.2B was finalized in the Iowa House, H.F. 517, 87<sup>th</sup> G.A., 1<sup>st</sup> Sess. (Iowa 2017). The legislative intent of the bill was conveyed by the author of the bill during a congressional debate:

“...Some of the folks that are of the criminal element may try to use the ‘stand- your-ground’ defense. They may tamper with evidence, they may not be legitimately in the situation we are trying to provide for, provide protections... We were looking at language to try and ensure that if someone is going to use the stand-your-ground defense that they are following the standard procedure that a law abiding citizen would follow. I know if I was in a situation where I would have to defend myself and use deadly force one of the first things I am going to do is I am going to call law enforcement. I am not going to tamper with evidence. I am not going to conceal any evidence. I am going to make sure that everything that happened is openly visible so that law enforcement can make a determination on their own. I am also not going to intimidate witnesses. I am not going to tell someone to not say what really happened. That’s not what a law abiding citizen does so we added language to the stand-your-ground provision to say that if you do use deadly force that

you have to notify law enforcement or ask someone else to notify law enforcement... This is a good addition to what we are trying to do. Every law abiding citizen would already be doing this.”

87 IA State Leg. (April 6, 2017)

<http://www.legis.state.ia.us/dashboard?view=video&chamber=H&clip=H20170406141248708&dt=2017-04-06&offset=3829&bill=HF%20517&status=r>

It is evident from this legislative history that Iowa Code 704.B is in an area permeated with criminal statutes. The legislature’s purpose was to ensure law enforcement would be notified to investigate the use of deadly force. Further, the legislative intent of the law was to underscore that if a person did not notify law enforcement of the use of deadly force, the person’s failure to report indicates that the individual is of the “criminal element”.

Fourth, Iowa Code § 704.2B(1) is a criminal statute because it was included as jury instruction in a criminal prosecution and used to argue criminal intent. “We consider the jury instructions as a whole rather than in isolation to

determine whether they correctly state the law.” State v. Harrison, 914 N.W.2d 178, 188 (Iowa 2018). Here, Iowa Code § 704.2B, jury instruction number 36, was included in chronological order with several other criminal jury instructions related to the reasonable use of force and the justification defense. Chronologically, the instructions were as follows: the reasonable force instruction (a person may use reasonable force to prevent injury to himself or another); the deadly force instruction (deadly force means force used to cause serious injury, create a strong probability of serious injury, discharge of a firearm in the direction of someone); and the justification instruction (a person is justified in using reasonable force if he reasonably believes the force is necessary to defend another from actual or imminent use of unlawful force). (Jury Instruction No. 34, 35, 36, 37) (App. pp. 22-25).

Here, jury instruction number 36 (Iowa Code § 704.2B) was interconnected and interwoven with the reasonable force and justification defense jury instructions. (Jury Instruction No. 36) (App. p. 24). When paired with the other instructions,

Iowa code 702.4B instruction suggests that failure to inform law enforcement equals criminal culpability.

This suggestion was emphasized in the present case when 704.B was used to argue that Gibbs' non-compliance indicated Gibbs did not use justification or reasonable deadly force. In the State's closing rebuttal, the last argument heard before jury deliberation began, the following was articulated:

"I want you [the jury] also to consider Instruction No. 36. The Court tells you that when somebody uses deadly force. The Court says, "A person using deadly force is required to notify or cause another to notify a law enforcement agency about his – or it could be her – use of deadly force within a reasonable degree –excuse me, "within a reasonable time period, if they can do so.

Ladies and gentlemen, remember I asked the witness in this case, "Did the defendant ever call 911. And the answer was no. I also asked "at any point, did he contact law enforcement and say that he shot Mr. Wessels?" Ladies and gentlemen, he did not. He did not fulfill one of the duties if somebody uses deadly force...

Ladies and gentlemen, the Defendant violated all these duties required of somebody that uses deadly force; and I suggest to you that you should use that information to consider number 1, did he believe that the use of force was needed, and number 2 was his use of force reasonable. I think ladies and gentlemen, when you consider that, the evidence will show that he was not justified in this case."

(Tr. p. 1101, L7- p. 1102, L16).

The State clearly used the requirement of Iowa Code § 704.2B for criminal purposes to argue for a criminal felony conviction.

In light of Iowa Code § 704.2B being included in the Iowa Code sections dealing with criminal conduct, the legislative intent to use § 704.2B as a criminal statute, the use § 704.2B as a criminal jury instruction to establish an element of first degree murder, second degree murder, and lack of justification. The statute is criminal and not regulatory. (See Jury Instructions No. 22, 29, 37) (App. pp. 20-21, 25).

***2. Iowa Code § 704.2B(1) is directed at a highly selective group inherently suspected of criminal activities.***

Iowa Code § 704.2B(1) is congruent to Albertson and the cases that followed because it is aimed at a highly selective group suspected of criminal activity as opposed to the general public.

Iowa Code § 704.2B(1) is directed toward individuals who use deadly force, a potentially criminal act. It is by design

created to trigger an investigation into the use of deadly force after individuals to report to law enforcement. Further, the statute suggests that when an individual delays or fails to notify law enforcement of their involvement they are intentionally avoiding criminal culpability and in this case, the non-compliance was used to argue against a justification defense. When taken all together, an individual who is compelled to report the use of deadly force, which could be criminal or not, increases the likelihood of discovery and his subsequent prosecution for his actions (i.e. murder, manslaughter, assault) or for other related criminal conduct (i.e. unlawful possession of a firearm, obstructing justice). This statute targets individuals, who, in reporting the use of deadly force “might involve” their admission to the crucial element of a crime”. Albertson v. SACB, 382 U.S. at 86, S.Ct. at 199. See Haynes v. United States, 390 U.S. at 97, 88 S.Ct. at, 730 (1968) (“the correlation between obligations to register violations can only be regarded as exceedingly high and a prospective registrant realistically can expect that registration

will substantially increase the likelihood of his prosecution.

Moreover, he can reasonably fear that the possession established by the registration will facilitate his prosecution.”).

***3. Compliance with Iowa Code § 704.2B(1) creates a real risk of self-incrimination by requiring an individual to provide a “link in the chain” for prosecution of homicide or other crimes.***

Any person compelled to disclose the use of deadly force would be “furnishing a link in a chain of evidence needed to prosecute him and as such these compelled disclosures are protected by the Fifth Amendment.” Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814, 818 (1951).

To establish that a Fifth Amendment violation occurred an individual needs to show a “substantial hazards of self-incrimination” can result from the compulsion and not guarantee a certainty of self-incrimination. California v. Byers, 402 U.S. at 428-429, 91 S.Ct. 1535, 1538-1539 (1971) (plurality opinion). See also Hilbel v. Sixth Judicial District, 542 U.S. 177, 189, 124 S.Ct. 2451, 2460 (2004) (stop and identify statute); State v. Iowa District Court for Webster

County, 801 N.W.2d 513, 562 (Iowa 2011) (no compulsion when a prisoner already convicted of the sex crime, upheld to acknowledge responsibility to be eligible for an earned-time reduction of sentence.).

Because compliance with Iowa Code § 704.2B(1) triggers and investigation by law enforcement, it compels disclosures that put an individual at risk of being charged with murder or other crimes. In that situation, there is no guarantee of immunity from prosecution and a “very real possibility of prosecution...for criminal offenses disclosed by or deriving from the information that the law compels [an individual] to supply.” Byers, 402 U.S. at 428, 91 S.Ct. at 1538. (plurality opinion); State v. Godbersen, 493 N.W.2d 852, 857 (Iowa 1992) (Iowa’s statute also assures anonymity to dealers purchasing drug tax stamps ...explicitly prohibits any information obtained from a dealer...from being released on used against the dealer in any criminal proceeding except in connection with a proceeding involving taxes.).

Because Iowa Code § 704.2B is part of a criminal statutory

scheme, is directed at a highly selective group inherently suspected of criminal activities, and creates a real risk of substantial hazards of self-incrimination, it is unconstitutional and violates the Fifth Amendment of the United States constitution. Further, due to the violation of this Fifth Amendment rights, Gibbs was denied his right to a fair trial under article I, § 9 of the Iowa Constitution.

***To the extent this Court believes that error was not adequately preserved then trial counsel was ineffective.***

The previous arguments are preserved, however, if this Court believes that trial counsel did not preserve error related Iowa Code § 704.2B(1) violation of the Fifth Amendment of the US Constitution and article I, § 9 of the Iowa Constitution counsel was ineffective in failing to do so. A criminal defendant is entitled to effective assistance of counsel. U.S. Const. amend VI; Iowa Const. art. I, 10; Strickland v. Washington, 466 U.S. 668 (1984). The test for determining whether a defendant received ineffective assistance of counsel is “whether under the entire record and totality of circumstances counsel’s

performance was within the normal range of competency.”  
Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). When  
specific errors are relied upon to show the ineffective assistance  
of counsel, the defendant must demonstrate: (1) counsel failed  
to perform an essential duty and (2) prejudice therefrom. Id.  
The defendant must show that there is a reasonable probability  
that but for counsel’s unprofessional errors the results of the  
proceeding would have been different. Strickland v.  
Washington, 466 U.S. 668, 694 (1984).

In determining whether counsel omitted an essential duty,  
the court looks to the nature of counsel’s conduct and the  
reason behind it. The court requires the appellant show that  
“the counsel’s performance was so deficient that counsel was  
not functioning as a counsel guaranteed by the Sixth  
Amendment.” Schertz v. State, 380 N.W.2d 675, 679 (Iowa  
1985).

Here, the failure of the trial attorney to sufficiently argue  
that Iowa Code § 702.4B(1), included in jury instruction  
number 36, violated Gibb’s Fifth Amendment rights guaranteed

by the U.S. Constitution and his due process rights under article I, § 9 of the Iowa Constitution was a breach of an essential duty. (Jury Instruction No. 36) (App. p. 24).

Gibb's was prejudiced by trial counsel's failure to adequately object to Iowa Code § 704.2B(1) as unconstitutional. Prejudice exists when it is reasonable and probable that the result of the proceeding would have been different. State v. Schaer, 757 N.W.2d 630, 638 (Iowa 2008). A reasonable probability is sufficient to undermine confidence in the outcome. Id.

In this case, the critical issue was whether Gibbs was justified in shooting Wessels. The inclusion of Iowa Code § 704.2B(1) as a jury instruction infringed on Gibbs's constitutional right against self-incrimination because Iowa Code § 704.2B(1) compels Gibbs to disclose that he was involved in a potential criminal offense. (Jury Instruction No. 36) (App. p. 24). In this case, the State argued that Gibbs' invoking his right against self-incrimination and failing to comply with Iowa Code § 704.2B(1) indicated that he did not use

reasonable deadly force and further was not legally justified in the shooting of Wessels. The State's use of an unconstitutional statute to satisfy the required element of proving Gibbs' acted without justification and the jury's reliance on the unconstitutional statute undermine the outcome and Gibbs was prejudiced.

In this case, Iowa Code § 704.2B(1), included in jury instruction number 36, violated Gibbs' Fifth Amendment rights. Additionally, Gibbs' right to due process was violated. Therefore, Gibbs' requests that this Court reverse his conviction and grant him a new trial.

**II. THE DISTRICT COURT ERRED IN ALLOWING IOWA CODE § 704.2B AS A JURY INSTRUCTION AND FURTHER ERRED BY NOT INCLUDING GIBBS' REQUESTED MODIFIED INSTRUCTION.**

**A. Preservation of Error:** Gibbs objected to jury instruction number 36, which was the verbatim language of Iowa Code § 704.2B. (Jury Instruction No. 36) (App. p. 24). Gibbs argued that jury instruction was misleading because it would allow the jury to "say that Levi Gibbs violated the law,

and they could conclude therefore, he's guilty and I know the state is going to argue that." (Tr. p. 1012, L21-L25). The State resisted the objection. (Tr. p. 1015, L11-p. 1016, L9). The district court ruled against Gibbs' objection. (Tr. p. 1017, L1-9). Therefore, error was preserved. State v. Allen, 304 N.W.2d 203, 206 (Iowa 1981).

To the extent this Court concludes that error was not properly preserved for any reason, Gibbs requests that the issue be considered an ineffective assistance of counsel framework. State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

**B. Standard of Review:** Challenges to jury instructions are reviewed for errors of law. State v. Anderson, 636 N.W. 2d 26, 30 (Iowa 2001). "We review related claims that the trial court should have given the defendant's requested instructions for abuse of discretion." Summy v. City of Des Moines, 708 N.W.2d 333, 340 (Iowa 2006). To the extent that jury is unconstitutional, the court reviews the district court's decision de novo. State v. Lyman, 776 N.W. 2d 865, 873 (Iowa 2010).

**C. Discussion:** The district court "is required to

‘instruct the jury as to the law applicable to all material issues in the cases...” State v. Marin, 788 N.W.2d 833, 831 (Iowa 2010); Iowa R. Civ. P. 1.924. “[T]he court is not required to give any particular form of an instruction” but “must...give instructions that fairly state the law as applied to the facts of the case.” Marin at 838. Error in giving or refusing to give a jury instruction does not warrant reversal unless it results in prejudice to the complaining party. State v. Cordero, 861 N.W.2d 253, 257-58 (Iowa 2015). “Prejudice will be found...where the instruction could reasonably have misled or misdirected the jury.” State v. Becker, 818 N.W.2d 135, 141 (Iowa 2012); See also State v. Hoyman, 863 N.W.2d 1, 7 (Iowa 2015).

***Jury instruction number 36 was misleading and confusing***

The instruction was confusing and misleading because it incorrectly implied that non-compliance with Iowa Code § 704.2B(1) foreclosed the use of the justification defense by Gibbs. Further, because the jury instruction suggested that Gibbs’ failure to report to law enforcement indicated that he was

admitting that he did not use reasonable force and was attempting to hide an unlawful murder from law enforcement. Either implication could lead the jury to inappropriately determine that failure to comply with Iowa Code § 704.2B meant the State satisfactorily established that the Gibbs acted without justification, a required element of murder in the first degree or second degree. (See Jury Instruction No. 22) (App. p. 20).

***The use of jury instruction number 36 was prejudicial to Gibbs***

Here, that fact that Gibbs did report to his use of deadly force to law enforcement thus failing to comply with Iowa Code § 704.2B(1), was highlighted during the trial. Special Agent Matt Shalk (hereafter “Shalk”) testified that Gibbs never admitted to shooting Mr. Wessels. (Tr. p. 641, L23-p.642, L13). Hedlund also testified on numerous occasions that Gibbs never told him that he shot Wessels or that he was acting in defense of another. (Tr. p. 801, L5-16; p. 806, L12-16; p. 831, L15 – p. 832, L7). Also, the jury watched the police interrogation video, where

Gibbs never admits to shooting Wessels. (Ex. 13).

After hearing this evidence, the court supplied the jury with instruction number 36:

If a person uses deadly force, the person shall notify or cause another to notify a law enforcement agent about the person's use of deadly force, if the person or another person, is capable of providing such notification...

(Jury Instruction No. 36) (App. p. 24).

Following the evidence of Shalk and Hedlund's testimony, Gibbs' police interrogation, and the jury's receipt of the reporting statute instruction, the argued in its closing rebuttal that Gibbs' failure to notify law enforcement should be used to determine that Gibbs acted unreasonably and without justification in shooting Wessels.

"I want you [the jury] also to consider Instruction No. 36. The Court tells you that when somebody uses deadly force. The Court says, "A person using deadly force is required to notify or cause another to notify a law enforcement agency about his – or it could be her – use of deadly force within a reasonable degree –excuse me, "within a reasonable time period, if they can do so.

Ladies and gentlemen, remember I asked the witness in this case, "Did the defendant ever call 911. And the answer was no. I also asked "at any point, did he contact law enforcement and say that he shot Mr. Wessels?"

Ladies and gentlemen, he did not. He did not fulfill one of the duties if somebody uses deadly force...

Ladies and gentlemen, the Defendant violated all these duties required of somebody that uses deadly force; and I suggest to you that you should use that information to consider number 1, did he believe that the use of force was needed, and number 2 was his use of force reasonable. I think ladies and gentlemen, when you consider that, the evidence will show that he was not justified in this case."

(Tr. p. 1101, L7- p. 1102, L16).

The use of the jury instruction in that manner was prejudicial to Gibbs because the State led the jury to believe that compliance with the statute bolsters the credibility of an individual if they comply with Iowa Code § 704.2B(1) by reporting to law enforcement. (Jury Instruction No. 36) (App. p. 24).

The State misled the jury to believe, incorrectly, that failure to report to law enforcement meant that Gibbs acted with unreasonable force and without justification. The State incorrectly used the non-compliance language in jury instruction number 36 to satisfy the justification element that is required to be proven by the State (the force used by the

defendant was unreasonable). (See Jury Instruction no. 36, 37) (App. pp. 24-25).

In the alternative, if this Court agrees the district court could have included the instruction, the district court also erred in not allowing the additional instruction that Gibbs requested from the Court. Gibbs requested the following language be added to jury instruction number 36: “if you determine that the defendant did not comply with of this instruction [jury instruction number 36], he is still legally able to assert the defense of another person as explained in instruction no [number]...” (Jury Instruction No. 36; Tr. p. 1010, L15-p. 1016, p. 25). If the Court allowed the proposed addendum, the misleading element of the instruction, would have been remedied by explaining that Iowa Code § 704.2B(1) had no bearing on the use of the justification defense. Gibbs’ recommended language assisted the jury on how to reconcile non-compliance with Iowa Code § 704.2B with a justification defense. Inclusion of this language would have more appropriately instructed the jury that Iowa Code § 704.2B on

the viability of Gibbs' justification defense.

The inclusion of the jury instruction was misleading and confusing for the jury because it suggested that Gibbs' failure to comply and inform law enforcement about his use of deadly force curtailed his right to claim he was justified in shooting Wessels. If the jury relied on that incorrect conclusion to reach their outcome, then confidence in their verdict is undermined.

The district court gave instructions that were contradictory, confusing, and misleading causing prejudice to Gibbs. Therefore, Gibbs requests that his court reverse his conviction and grant him a new trial.

### **CONCLUSION**

Because Iowa Code § 704.2B violates the Fifth Amendment of the United States constitution and article I, § 9 of the Iowa Constitution and because the district court erred in instructing the jury, Gibbs requests this Court reverse his conviction and remand for a new trial.

### **ORAL SUBMISSION**

Counsel requests to be heard in oral argument.

## ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$ 5.02, and that amount has been paid in full by the Office of the Appellate Defender.

## CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

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Astewart

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